



July 27, 2000

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health & Mental Retardation
P O Box 12668
Austin, Texas 78711-2668

OR2000-2846

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137477.

The Texas Department of Mental Health & Mental Retardation (the "department") received a request for "[s]ummaries of the series of events" pertaining to fourteen specifically identified cases in which a restraint was used against a patient, each at a state school or state hospital, and involving the death of the patient.¹ You indicate the department has released to the requestor some of the information that is responsive to the request. You have provided for our review additional responsive information.² You assert that this information is

¹The request specifically seeks details pertaining to the restraint of each patient, as follows: "what specifically about the patient's behavior prompted the restraint," the period of time that elapsed between the restraint of the patient and the death of the patient, "the reason for the patient's release from the restraint," "whether or not the patient was responsive when the restraint ended," "the patient's response to the restraint," "the number of workers who executed the restraint," the type of restraint (personal or mechanical), the position of the patient during the restraint, and how the mechanical restraint works.

²Most of the documents submitted for our review contain markings that identify the specific information within the document that is responsive to the request, or else the entire document is identified as responsive and contains responsive information. However, some of the submitted documents contain no such markings, and are not specifically identified as responsive to the request. For example, the documents for case number 39529 include sections marked "Medical Record" and "Death Review Documents." The documents for case number 43237 include a section marked "Medical Record." In both cases, you have also submitted and separately identified the responsive information. For some documents, you have submitted two copies of the document, one identified as responsive and the other included amongst the documents in the sections marked "Medical Record" or "Death Review Documents." We therefore assume that the documents in cases 39529 and 43237 that are contained in the sections marked "Medical Record" and "Death Review Documents" were submitted solely as additional information in support of the exceptions you have asserted for the responsive information. This decision addresses only those documents that have been specifically identified

excepted disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.³

We note at the outset that the requestor's law firm has submitted comments to this office which, in part, involve a clarification of the scope of the request. *See* Gov't Code § 552.304. These comments state in pertinent part that "the information sought by the Requestor can be provided with the client identifying information redacted." Since the requestor has clarified that the request does not encompass client identifying information, this decision does not specifically address your arguments pertaining to such information. However, because we agree that the client identifying information contained in at least some of the records that are subject to release constitutes information that must be withheld from the requestor under section 552.101 of the Government Code, and because the client identifying information is not responsive to the present request, the department must redact all client identifying information from those records that this decision requires be released to the requestor.

We additionally note at the outset that the Public Information Act's exceptions do not, as a general rule, apply to information expressly made public by other statutes. *Open Records Decision No. 525 (1989)*. You indicate with reference to some of the cases that responsive information is contained in autopsy reports. Autopsy reports must be disclosed, in that they are expressly made public by the Code of Criminal Procedure. *See* Code Crim. Proc. art. 49.25, § 11. Thus, the department must release to the requestor the responsive information that is contained in the submitted autopsy reports.⁴

as consisting of or containing responsive information.

³We have made every effort in this decision to address every document you have submitted that is indicated to consist of or contain responsive information. We note that you did not label exhibits "C-1," "D-4," "D-6," "F-4," "L-3," "V-1," "W-1," "CC-7," "LL-1," or "NN-2." We additionally note that you apparently did not submit exhibits "A-2," "A-7," or "I-8." Also, a number of the exhibits were incorrectly marked, as follows: exhibit "CC-5" was submitted with the label "A-7," exhibit "BB-1" was labeled as "J-1," exhibit "B-1" was labeled as "D-1," exhibit "B-3" was labeled as "M-1," exhibit "CC-5" was labeled as "A-7," exhibit "DD-1" was labeled as "CC-3," and exhibit "G-1" was labeled as "II-4." Finally, as discussed below, your comments and arguments do not specifically address some of the exhibits that were properly submitted. *See* Gov't Code § 552.301(e)(1)(A), (2). These numerous errors in your submission to this office evidently relate to the fact that you submitted voluminous documents that you were compelled to prepare for our review within a short time frame. We note that the submitted information includes multiple copies of the same types of documents that were evidently created and maintained under the same types of circumstances. We advise that in such circumstances where the requested information is voluminous, the Public Information Act specifically allows the department to submit to this office representative samples of the responsive information. *See* Gov't Code § 552.301(e)(1)(D). We encourage the department, where appropriate, to avail itself of this provision in future requests to this office.

⁴We have marked with green flags the documents that this decision provides are not excepted from required public disclosure. The autopsy reports at issue are contained in exhibits "A-4," "A-8," "I-1," "I-2," "I-3," "I-5," "I-6," "I-7," "JJ-1," "BB-3," and "WW-1." Additionally, although your correspondence dated May 31, 2000 indicates that exhibit "I-8" consists of the autopsy report for case number 992 (Corpus Christi

You assert section 552.103 of the Government Code, the "litigation exception," with reference to the responsive information in three of the fourteen cases at issue (case numbers 43237, 87231, and 93946). In relevant part, section 552.103(a) states:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

As to the first prong of the above-stated test, litigation must be pending or reasonably anticipated on the date that the information is requested. Gov't Code § 552.103(c). We note that the department received the present request for information on May 9, 2000. In case number 87231, you have demonstrated that litigation involving the department was pending at that time. In the cases numbered 43237 and 93946, although not pending, you contend that the department reasonably anticipates litigation. This office has stated that a governmental body may establish that litigation is reasonably anticipated for purposes of section 552.103 by (1) showing that it has received a claim letter from an allegedly injured party or his attorney and (2) stating that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA"). Open Records Decision No. 638 (1996). In both cases 43237 and 93946, you in each case have provided this office a notice which you represent complies with the notice of claim provisions of the TTCA. The notice pertaining to case number 93946 is indicated to have been received in February, 2000. Thus, we agree that the department reasonably anticipated litigation pertaining to case number 93946 on May 9, 2000 when the present information request was received. However, the notice pertaining to case number 43237 is dated May 16, 2000 and is indicated to have been received by the hospital on the following day. Because the hospital received this notice after the department received the present information request, you have not demonstrated that the department reasonably anticipated litigation in case number 43237 on the date that the information at issue was requested. We therefore conclude that you have met the first prong of the section 552.103 test only with reference to the cases numbered 87231 and 93946.

State School), this exhibit was not submitted for our review. If exhibit "I-8" consists of or contains information that is responsive to the request, such information must be released to the requestor.

As to the second prong of the section 552.103 test, we have carefully examined the responsive information in cases 87231 and 93946, and we conclude that the entirety of this information relates to the pending or anticipated litigation. Thus, you have demonstrated the applicability of the litigation exception to the responsive information in these two cases. However, if the opposing party in the litigation has seen or had access to any of the information at issue, there is no section 552.103 interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We have no indication that this is the case with reference to any of the responsive information at issue.⁵ Except as otherwise specifically noted herein, we therefore conclude that the department may withhold the entirety of the responsive information in cases 87231 and 93946 pursuant to section 552.103 of the Government Code. Once the litigation concludes, we advise that the applicability of section 552.103 ends.⁶ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. We understand your arguments to assert various confidentiality provisions in chapters 159, 160, and 303 of the Occupations Code, chapter 161 of the Health and Safety Code, and chapter 48 of the Human Resources Code. We next address these assertions.

As to chapter 48 of the Human Resources Code, you contend some of the information is confidential under section 48.101. This provision pertains to investigations of the Department of Protective and Regulatory Services, and states in pertinent part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

⁵For example, exhibit "K-1" in case number 93946, exhibit "XX-1" in case number 87231, and exhibit "GG-1" in case number 39529 each consist of or contain documents that the hospital received from the opposing party in the anticipated litigation, or that on their face are indicated to have been made available to the opposing party. These documents are therefore not excepted from required disclosure by section 552.103. However, we understand that these documents were provided solely as information in support of the section 552.103 assertion, and that these exhibits were not submitted as containing responsive information. The department therefore is not required to release exhibits "GG-1," "K-1" or "XX-1" to the requestor.

⁶We do not separately address your section 552.101 assertion with reference to the information that this decision concludes is excepted under section 552.103. However, we note that the records at issue contain information that is confidential by law, and which therefore must not be released even at the conclusion of the litigation. Gov't Code §§ 552.101, .352. Thus, if the department receives a future request for the information after the litigation concludes, and absent a previous determination from this office as to the confidentiality of the precise information at issue, you should again ask this office for a decision. The information the department may withhold under section 552.103 is found in exhibits "A-3," "A-4," "D-2," "F-2," "F-3," "H-2," "L-1," "M-1," "N-1," "O-1," "P-1," "Q-1," "R-1," "S-1," "T-1," "U-1," "V-1," "W-1," "X-1," "Y-1," "Z-1," "AA-1," and "HH-1."

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

...

(e) The department or investigating state agency may adopt rules relating to the release of information contained in the record of a deceased individual who was the subject of an investigation conducted by the department or investigating state agency or to whom the department has provided protective services. The rules must be consistent with the purposes of this chapter and any applicable state or federal law.

We believe you have demonstrated that some of the submitted information is confidential pursuant to section 48.101(a) of the Human Resources Code.⁷ Consequently, the information must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See* Hum. Res. Code § 48.101(b). *See also* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). As you have not indicated an applicable rule that would permit release to this requestor, and because no other release provision appears to apply in this instance, we conclude the information must be withheld from the requestor.⁸

As to chapter 159 of the Occupations Code, you contend some of the information is confidential under section 159.002. This provision is part of the Medical Practice Act

⁷*See also* 25 T.A.C. § 417.511 and 40 T.A.C. § 710.12 (reports, records, and working papers used by or developed in the investigative process and the resulting final report regarding abuse and neglect are confidential and may be released only as provided by applicable law and department rule).

⁸This conclusion applies to information in exhibits "E-6," "H-1," "H-2," "H-3," "H-4," "H-5," "H-6," "H-7," "P-4," "W-2," "TT-2," "KK-1," and "VV-1."

("MPA), found at Subtitle B of Title 3 of the Occupations Code, which governs records of the treatment of a patient by a physician. Section 159.002(b) states:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

We believe that you have demonstrated the applicability of section 159.002(b) to some of the submitted information, and that this provision makes the information at issue confidential. Although sections 159.003 and 159.004 provide for certain exceptions to confidentiality, none of these exceptions appears to apply in this instance. *See* Occ. Code §§ 159.003, .004. We therefore conclude you must withhold the information from the requestor.⁹

Your remaining arguments relate to the assertion of peer review and hospital committee privileges. You explain that the information in two of the exhibits ("BB-1" and "BB-2") pertains to the peer review of a nurse. Section 303.006(a) of the Occupations Code provides:

Except as otherwise provided by this chapter, a nursing peer review committee proceeding is confidential and any communication made to a nursing peer review committee is privileged.¹⁰

Section 303.007 provides for certain exceptions to the above-quoted confidentiality provision, none of which appears to apply in this instance. *See* Occ. Code § 303.007.

Additionally, you explain that some of the submitted information pertains to either an administrative or a clinical death review procedure. *See* 25 T.A.C. § 405.261 *et. seq.* You also advise that one document (exhibit "EE-2") was derived from the peer review of a physician. Section 160.005 of the Occupations Code provides that a peer review report "is confidential and is not subject to disclosure under Chapter 552, Government Code." *See* Occ. Code § 160.005. Section 161.032 of the Health and Safety Code states:

(a) Records, information, or reports of a medical committee or medical peer review committee and records, information, or reports provided by a medical committee or medical peer review committee to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

⁹This conclusion applies to information in exhibits "A-1," "B-2," "B-4," "B-5," "B-7," "C-1," "C-3," "D-1," "E-3," "E-4," "L-2," "P-3," "P-5," "CC-1," "CC-2," "CC-3," "CC-4," "EE-2," and "RR-1."

¹⁰In similar contexts, the legislature has used the term "privileged" to mean "confidential" when applied to communications. *See* Health & Safety Code § 773.091. *See also* Fam. Code § 231.108. (Confidentiality of Records and Privileged Communications).

Medical peer review is defined by the MPA to mean “the evaluation of medical and health care services” Occ. Code § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” Occ. Code § 151.002(a)(8). Section 160.007 of the MPA states that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” Occ. Code § 160.007.

Subchapter D of Subtitle H of the Health and Safety Code also speaks to the issue of medical peer review. Included in the definition of the term “medical committee” is any committee of a hospital, a hospital district, or a hospital authority. Health & Safety Code § 161.031(a)(1),(6),(7). The term includes a committee appointed ad hoc to conduct a specific investigation. Health & Safety Code § 161.031(b). Section 161.032 provides that information related to a medical committee or medical peer review committee is not subject to disclosure under Chapter 552. *See* Health & Safety Code § 161.032(a).

However, section 161.032 further provides that “this section and [chapter 160 of the Occupations Code]¹¹ do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, or extended care facility.” Health & Safety Code § 161.032(b); *see Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded the same treatment under both statutes in determining if they were made in regular course of business). In *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988), the Texas Supreme Court indicated that “routinely accumulated information” unless submitted or created in connection with a committee’s deliberative process, does not constitute confidential committee records. In *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 648 (Tex. 1985), the court stated that records “gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected.”¹² *See McCown*, 927 S.W.2d at 9-10 (discussing business records and holdings in *Barnes* and *Jordan*).

In considering the above-cited provisions and case law, and upon careful review of the documents at issue, we believe you have demonstrated the applicability of a peer review or

¹¹Section 5.06, Medical Practice Act (formerly Article 4495b, V.T.C.A.).

¹²*Barnes* and *Jordan* both relied upon the predecessor statute to section 161.032 of the Health & Safety Code, section 3 of article 4447d, Vernon’s Texas Civil Statutes, which provided, in part, that “records made or maintained in the regular course of business” were not confidential.

hospital committee privilege to many of the submitted records. The department must therefore withhold these records from the requestor.¹³ It appears, however, that some of the documents for which you assert a peer review or hospital committee privilege constitute records that were made during the regular course of business. In some cases, we are not advised and the documents themselves do not indicate whether the information was submitted or created in connection with the deliberative process of a peer review or death review committee. Consequently, you have not demonstrated the applicability of section 160.007 of the Occupations Code or section 162.032 of the Health and Safety Code for every document for which you have asserted a peer review or hospital committee privilege. However, we also have considered whether one or more of the other confidentiality provisions discussed herein applies to these records, and we conclude in some instances (as discussed above and below) that the record is nevertheless confidential.

In addition to the confidentiality provisions you have asserted, we have considered whether any of the remaining records are confidential under chapters 595 or 611 of the Health and Safety Code. We believe that access to certain mental health records is governed by the provisions of chapter 611. Sections 611.002(a) and (b) read as follows:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health and Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. We find that the information in exhibit "NN-1" constitutes mental health records that are confidential under section 611.002. It appears none of the exceptions to confidentiality applies in this instance. Thus, the department must withhold this exhibit in its entirety.

Chapter 595 governs access to certain department records of clients who are mentally retarded. Section 595.001 states:

¹³The following exhibits consist of or contain documents which we agree are confidential pursuant to section 160.007 of the Occupations Code or section 162.032 of the Health and Safety Code: "A-6," "A-8," "A-9," "A-10," "B-6," "C-2," "C-5," "D-1," "D-3," "D-5," "D-7," "D-8," "E-1," "E-5," "F-1," "F-4," "F-5," "I-6," "J-1," "J-2," "BB-2," "BB-3," "SS-1," "TT-1," "TT-2," and "UU-1."

Records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004.

Health and Safety Code § 595.001. We have identified records which we believe are encompassed by the above confidentiality provision. Section 595.003 permits disclosure of these records if the department obtains a proper written consent, provided the disclosure is permitted by department rule. *See* Health and Safety Code § 595.003. However, we have no indication that the department has received a proper written consent pursuant to this provision. Section 595.004, with certain limitations, permits access by the “person about whom the record was made,” which is clearly not applicable in this instance. *See id.* § 595.003. Chapter 595 contains certain additional exceptions to confidentiality, but none of these exceptions appears to apply. *See id.* §§ 595.005 *et seq.* Therefore, the department must not release to the requestor the records we have identified as being subject to section 595.001.¹⁴

Finally, we address exhibits “II,” “II-1” through “II-11,” “LL-1,” and the documents attached to these exhibits. You describe this information as “summary responses” created by the hospital or state school, apparently in response to the present request or an earlier request. You assert no confidentiality provision for these documents, nor is it apparent that any of the confidentiality provisions discussed herein applies to these documents. Also, you make no arguments for withholding from the requestor any of the information contained in these documents. *See* Gov’t Code §§ 552.301, .302. In addition, it appears that at least some of this information previously was released to the public. *See* Gov’t Code § 552.007(b) (unless release is prohibited by law or confidential under law, a governmental body must release information that it has voluntarily made available to the public). We thus conclude that exhibits “II,” “II-1” through “II-11,” “LL-1,” and the attached documents are not excepted from required public disclosure and must be released to the requestor.

In summary, we have marked with green flags the documents that are not excepted from required public disclosure. The department therefore must release to the requestor any responsive information that is contained in these documents. The remaining submitted information is excepted from disclosure under section 552.101 or 552.103 of the Government Code, as discussed above.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

¹⁴The records at issue consist of or are contained in the exhibits marked “C-4,” “E-2,” “E-3,” “E-4,” “E-6,” “P-2,” “MM-1,” “PP-1,” and “XX-1.”

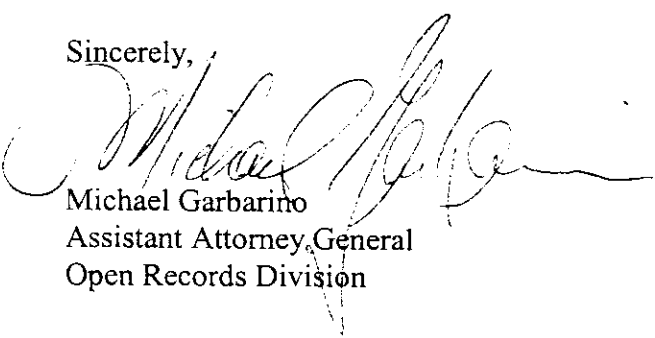
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 137477

Encl. Submitted documents

cc: Ms. Karisa King
San Antonio Express News
P O Box 2171
San Antonio, Texas 78297-2171
(w/o enclosures)